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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 188

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

HAROLD R. ALE, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (AND APPENDICES).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

HOMAN MFG. CO., INC., AN ILLINOIS CORPORATION,
Petitioner,

vs.

HAROLD R. ALL, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Homan Mfg. Co., Inc., an Illinois corporation, formerly named Shotwell Manufacturing Co., by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case (*sub nom. Homan Mfg. Co., Inc. v. H. Allan Long, Director*, etc.)[1] on February 17, 1959.

1. Harold R. All replaced H. Alan Long as District Director of Internal Revenue at Chicago after the Court of Appeals decision herein and was thereafter substituted as defendant.

OPINIONS BELOW.

This case, involving a jeopardy assessment of asserted additional income taxes against petitioner, found by the District Court to have been "patently arbitrary [and] capricious" (Appendix B, p. 12, *infra*) and by the concurring Judge of the Court of Appeals to have been "deliberately put at [a] fantastic and insupportable figure simply so that Homan couldn't pay it, thus creating the appearance of jeopardy" (Appendix A, p. 5, *infra*), has twice been to the Court of Appeals for the Seventh Circuit.

A directly related, criminal income tax case, *United States v. Shotwell Manufacturing Co., et al.*, 355 U. S. 233, was decided by this Court on December 16, 1957. In that companion case, because of emphatic charges that the defense had there worked a perjurious fraud on the Courts in a suppression of evidence hearing and perhaps had bribed Internal Revenue personnel, this Court took the unusual action of permitting the prosecution to reopen a suppression of evidence hearing.

The post-trial hearing so directed by this Court was held in December 1958 and *has resulted in findings by Judge Nordbye of no perjury; nor was there any proof, or finding, of bribery of anyone, nor any attempt to prove the vicious allegation of the Huebner affidavit to this Court therein* (See 355 U. S. at p. 240) *that he had been kept off the stand in the original proceedings because he threatened to tell the truth.*

(Despite the collapse of the prosecutors' claims here as to the *Shotwell* disclosure, Judge Nordbye persisted in holding in bitter (and we say wholly unjustified) terms, that the *Shotwell* disclosure was not in "good faith" because, so he believes (we say erroneously), the corporate officials involved were guilty of personal tax evasion and should have said so in connection with the *Shotwell* disclo-

sure; he concludes that what he considers (on his view of the law) to have been "a dishonest and false disclosure cannot be held to be a timely voluntary disclosure" even though made at an appropriate date.

On the reopened hearing, defendants had suggested the propriety of Judge Nordbye recusing himself because he had announced in 1952 that he had "rather fixed views" on the subject of disclosure (*U. S.* v. *Shotwell*, R. 448). He declined to do so. His opinion on the reopened hearing shows that he thinks the *Shotwell* defendants must somehow have been bad; it is so laced with harsh language that it must be read closely and against the opinion of this Court for one to realize how it glosses the fact that the Government, given the greatest leeway, was unable, with a single exception, to convince him, of the truth of the specific charges made to, and carefully recapitulated by, this Court in numbered sentences at 355 U. S. p. 239 (partially quoted at Appendix p. 42, *infra*). Judge Nordbye has resentenced and the *Shotwell* case is again on its way to the Seventh Court of Appeals. His opinion appears as Appendix D hereto.[2]

2. We are entitled to make the outcome of the reopened hearing in *Shotwell* clear even though that case is not now before the Court, in order to remove from petitioner the "shadow" the Government's unusual charges there cast upon petitioner.

In its entire history this Court had never had a case like that presented by the Motion to Remand in *Shotwell*. Neither we nor the Solicitor General were able to find a precedent squarely in point. It is plain that this Court was deeply disturbed, not by questions of law as to what the Treasury's "voluntary disclosure" policy did or did not entail, for the Court denied certiorari on such questions and bypassed them in its opinion; it was concerned with a more fundamental question—the charge, from believed responsible sources, that the entire evidence as to a disclosure was wholly a perjurious fabrication of which the record should be "cleansed."

So serious a charge, both in its effect upon this Court and upon the citizens against whom it was leveled, should have been made only upon unassailable evidence. But the affidavits on which it was based have been demonstrated to have been so flagrantly false that they will leave disturbing questions in the Treasury and Jus-

The opinion of the Court of Appeals (Judges Schnackenberg and Hastings, Chief Judge Duffy concurring in a separate opinion), rendered February 17, 1959 in support of the judgment sought to be reviewed here, is reported at 264 F. 2d 158 and appears as Appendix A hereto.

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tice Departments, and the courts, for a long time. The precepts of *Mesarosh* v. *U. S.*, 352 U. S. 1, and *Berger* v. *U. S.*, 295 U. S. 78, necessary to ethical administration of justice by public lawyers, were held for naught by someone in *Shotwell*. (Cf. *Napue* v. *Illinois*, No. 583 this term.)

However, "the darkest shadow" (Cf. 355 U. S. at 240) of polluting the courts, placed upon petitioner by that violation of public duty in *Shotwell*, has been removed, whatever Judge Nordbye's view may be as to the legal sufficiency of the *Shotwell* disclosure. Petitioner is entitled to stand free of the "shadow".

The facts, even as Judge Nordbye grudgingly concedes them to be, as to *what* was disclosed to Internal Revenue and *when* it was disclosed, are essentially the facts given on the original suppression hearing in *Shotwell*. They are far from those falsely asserted in the affidavits filed in this Court to the general effect that there had been no disclosure at all. Of the five charges recapitulated by this Court at 355 U. S. 239 (See Appendix, p. 42, *infra*), and the charge that Huebner was deliberately kept off the stand in the first hearing, Judge Nordbye finds only charge five was true. (We say he errs even as to charge five.) The result of the reopened hearing—a vindication of the original disclosure testimony—is the more notable in that neither Busby, Cain nor Sauber took the stand on the reopened hearing to bolster their original testimony. Sauber and Busby testified not at all and Cain (by reason of health), but briefly and only on new subjects. The prosecutors' stridently asserted charge of perjury collapsed of its own fetid weight.

The "darkest shadow" in Shotwell, therefore, now rests not upon petitioner but upon those who made or procured the false affidavits filed in this high Court. This Court recognized that the Motion to Remand filed with it created an inevitable dilemma, saying (355 U. S. at 242-3) in a pithy sentence which the Nordbye opinion ignores: "It is plain, that *either* the testimony in the District Court [in the original *Shotwell* suppression hearing] was untrue *or these affidavits themselves are the product of fraud.*"

Having found, as the evidence on the reopened hearing compelled him to, that the original relevant testimony in the District Court was essentially true, Judge Nordbye should have found who it was that inspired the fraudulent affidavits, for they did not spring into existence spontaneously. Untrue, they yet fitted one to another, like a hand to a glove—they scarcely could have fitted

The Findings of the District Court for the Northern District of Illinois, Eastern Division (Judge J. Sam Perry), not disturbed by the Court of Appeals, and its Conclusions and Decree, reversed by the Court of Appeals in the judgment sought to be reviewed, were entered March 24, 1958, are not reported, and appear as Appendix B hereto.

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so well by mere inadvertence, for while truth easily fits itself to truth, a series of lies will fit only by design.

But Judge Nordbye indirectly dismissed the unpleasant dilemma posed by this Court's opinion with the remark, "I do not believe that any government official has attempted to have any witness herein testify falsely" (Appendix D, p. 55, *infra*). Falsity of affidavits filed in our highest Court and regarded by it as important enough to be recapitulated in its opinion and to cause it to enter an unprecedented remandment order, should scarcely be so easily condoned.

Who is responsible for the fraudulent false affidavits? Duty to resolve that question rests more upon the Solicitor General than upon us. Certainly, we assume the Solicitor General accepted the affidavits in good faith, although it would have been desirable for him to have inquired more searchingly than he apparently did into the history behind them, for the record before Judge Nordbye showed that affiant Graflund, between November 1955 and the giving of his false affidavit to this Court, had been "interviewed" at least 13 times by Government employees and had given contrary statements; affiant Huebner was "interviewed" innumerable times and had given at least 7 statements having many contrary assertions in them; Revenue Agent Lima was "interviewed" at least 9 times (including a lie detector test in what he cynically termed "refresher courses". These interviews took place at times when those individuals were entirely uninfluenced by the defense and additionally had given sworn testimony before a grand jury at radical variance from their affidavits or representations to this Court.

The facts suggested in this note are far from irrelevant to the proceeding at bar because the affidavits of Justice and Treasury officials attached to the Motion to Remand (Amended) filed in this Court in *Shotwell* show that the Treasury campaign against Shotwell and its officers that culminated in the false affidavits in *Shotwell* and in the false assessment at bar was undertaken in 1955 as one campaign—the *false assessment* now at bar and the *false affidavits* in the *Shotwell* case were, we submit, illegal twins of the same parentage. Each fraudulent abuse of power reflects on the other and illumines the reckless drive to exterminate petitioner

The first opinion herein of the Court of Appeals (Judges Finnegan, Lindley and Swaim), rendered February 4, 1957, is reported at 242 F. 2d 645, and appears as Appendix C hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered February 17, 1959; timely petition for rehearing was denied April 10, 1959. Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

(a) Are the courts without jurisdiction to enjoin collection of a jeopardy income tax assessment found to have been made arbitrarily, capriciously and without reasonable cause, solely because the taxing statute under which such assessment was made is a valid statute and the taxpayer is a person who might be liable to pay a legally determined tax thereunder, even though the assessment actually made has been made illegally and collection thereof would result in irretrievable damage to the taxpayer for which he would have no effective legal remedy?

(b) If Section 7421 of the Internal Revenue Code of 1954 is construed to deny the courts jurisdiction to enjoin collection of an illegally made jeopardy assessment, collection of which would bring special and irretrievable damage to the taxpayer, is the statute invalid as a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The constitutional provision involved is the Fifth Amendment, which provides in part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

The principal statute involved is 26 U. S. C. A. § 7421(a), which provides:

> "Except as provided in section 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (The exception is here irrelevant.)

STATEMENT OF THE FACTS.

What the District Court found to be grossly illegal conduct Internal Revenue Service can be understood only in connection with the chronology of the *Shotwell* case:

In *Shotwell* it was asserted (and denied) that petitioner evaded alleged additional taxes of $254,000 on $454,000 income from black market sources in 1945 and 1946.[3] The defendants asserted that Shotwell (Homan) had collected cash black market premiums only to get cash to spend on black market premiums for raw materials; that the true amount of its black market receipts was balanced by black market expenditures; that when the defendants learned in early 1948 that Internal Revenue would not allow black market expenditures as deductible expenses, they made a "voluntary disclosure" to the Bureau's Chief Field Deputy in Chicago before any investigation had been commenced and, hence, were entitled to the immunity from prosecution which the Treasury repeatedly had promised as an inducement to taxpayers to voluntarily disclose irregularities, and in any event were entitled to suppression of the evidence furnished on the inducement of immunity. The trial court (Judge Nordbye) in 1952 held otherwise, and in 1953 the Shotwell defendants were convicted.

3. It is now conceded that testimony even as to these amounts was "exaggerated" (Appendix pages 44-5, *infra*), "*exaggerated*" being a mere delicate euphemism for perjury by the prosecutors' notorious and loathsome star witness, one David Lubben.

On June 15, 1955 the Court of Appeals for the Seventh Circuit held in the *Shotwell* case that the promised immunity was unenforceable but that the evidence surrendered in reliance on the promise should have been suppressed, and ordered a new trial (225 F. 2d 394). On August 18, 1955 the Court of Appeals denied the Government's petition for rehearing therein.

While the criminal case was in the foregoing status, the Service, on September 15, 1955, seized all of Homan's (Shotwell's) assets under a jeopardy assessment which asserted that the tax deficiency for 1945-6 was $1,036,000 rather than the $254,000 asserted on the criminal trial (plus $462,000 for the year 1944 not involved in the criminal case). The total assessment, including penalties and interest, was $3,172,000 (App. 235), whereas Homan's total assets were approximately $1,114,000 (App. B, 109). Enforcement of the assessment would have meant the corporate death of petitioner because it would not have been able to pay its franchise taxes, much less defend itself in the criminal case or litigate civilly as to whether it owed any taxes. Accordingly, on September 23, 1955, the instant suit, praying an injunction against collection, was filed (App. 15, *et seq.*).

THE COMPLAINT.

The verified complaint herein alleged, with respect to the invalidity of the assessment and levy (App. 24), that petitioner owed no additional taxes for the years 1944, 1945 and 1946, that the assessment was wholly arbitrary, capricious and unjustified, and was made after the time for assessment had expired. It further charged (App. 25) that "not merely is the assessment itself arbitrary, capricious and without reasonable basis, as heretofore alleged, but that no cause for a determination of jeopardy exists"; that the assessment and levies were "beyond the lawful authority of the defendant and that enforcement of them

or delivery of any of [petitioner's] property thereunder would deprive [petitioner] of its property without due process of law, in violation of the Fifth Amendment * * *" (App. 26).

PROCEEDINGS AND ORIGINAL SUMMARY JUDGMENT.

After due notice, a preliminary restraining order was entered herein by Judge J. Sam Perry September 26, 1955 (App. 35), and a preliminary injunction on September 28, 1955 (App. 40).

Answer was filed and plaintiff took a lengthy deposition (App. 72-232) of Revenue Agent Mannuel who principally made the assessment and had worked on nothing but this case since 1949. The agent testified wholly from memory and, on advice of the Justice Department, refused to produce his Report or any relevant notes, memoranda or computations justifying his conclusions (App. 104, 178, 179, 198, 200, 202, 203, 220, 224, 229, 230). On the strength of admissions in that deposition and other evidentiary material, taxpayer moved for summary judgment (App. 361, 367-369). The Government, on the strength of affidavits (App. 388-391) showing merely that the assessment had been made in accordance with proper formal procedures, also moved for summary judgment. The District Court (Judge Perry) on June 14, 1956, denied defendant's motion, granted plaintiff's, and permanently enjoined collection (R. 417).

FIRST DECISION OF COURT OF APPEALS.

On appeal from the summary judgment, the Court of Appeals for the Seventh Circuit, although recognizing that,

> "Homan bases its case on the theory that the assessment is so arbitrary and capricious that it is illegal" (Appendix C, p. 36, *infra*),

held that summary judgment was "improvidently granted"

and remanded the case to the District Court for a full trial and development of further "facts playing in, on or about the assessment" (Appendix C, p. 38, *infra*).

THE ATTEMPT TO TRY THE CASE AND FINAL JUDGMENT.

After remandment of the instant case to the District Court, petitioner, preparatory to trial, moved (App. B. 28) under Rule 34 for the production of specified Treasury documents pertaining to the assessment, the contents of which necessarily would furnish details lacking in the Agent's testimony and would disclose further "facts playing in, on or about the assessment." No objection was made that the documents were not relevant, or that good cause for their production had not been shown, but Government counsel refused to produce them, claiming privilege. The District Court ordered production (App. B. 30) and the Department of Justice asserted that all the documents had been delivered by the Treasury to the Attorney General who persisted with the claim of privilege (App. B. 32-35). The District Court thereupon, on March 24, 1958, entered final judgment (App. B. 104) under Rule 37 because of failure of discovery and, independently of the Rule, because of the facts already shown of record, voiding the assessment.

The District Court found (App. B. 107, *et seq.* Appendix B, p. 7, *infra*) (paragraph numbers below conform to the District Court's paragraph numbers):

> "2. The documents involved contain relevant and material evidence with respect to the validity of the assessment in question, or are reasonably calculated to lead to the discovery of admissible evidence. Many of them are shown by the testimony of the witness Mammel to be admissible in evidence and clearly requisite to a full and fair determination of the facts pertaining to the assessment. Although many of the facts

already are clear upon evidence thus far received, the plaintiff cannot fully and completely try its case, as it has been directed to do by the Court of Appeals, nor can this Court make the detailed evidentiary inquiry it believes the Court of Appeals felt was proper, if the said documents are withheld. * * *

"4. It is just (a) that the Court, exercising its dignity, powers and discretion under Rule 37 and its duty to protect citizens against taxation and deprivation of property except by due process of law, find; and it hereby does find that the defendant H. Alan Long is in default herein and that a judgment by default be entered against him and in favor of the plaintiff, the evidence that plaintiff is entitled to relief being satisfactory to the Court and the Court so finding, and (b) that insofar as detailed facts are reasonably established by a fair preponderance of the evidence heretofore received, that subsidiary findings be and hereafter are made thereon, and that the decree of the Court and such findings rest not merely upon such default but independently thereof, and concurrently therewith, upon the evidence thus far received."

"5-8. The assessment in question is patently arbitrary, capricious and wholly void.

"5-9. In making his determination of taxable net income Mammel made no attempt to be fair to the taxpayer at any time; he proceeded on the assumption that he was only required to be fair to the taxpayer 'if I can' and did not adhere even to that standard.

"5-10. The alleged additional income determined by Mammel consists principally of (a) alleged overceiling cash 'premiums' paid by one Lubben which asserted payments were the subject matter of the criminal case; (b) approximately $964,000 gross income which it is asserted should have resulted from extra manufacture of candy, which Mammel believes should have occurred but which is not reflected on the records of the company; and (c) disallowance of sundry items of expense. In determining item (a) above, Mammel both relied upon, and misconstrued, items of evidence ordered suppressed in the criminal case, relied upon altered and changed purported records of

said Lubben, wholly failed to make any good faith practical judgment as to offsetting black-market expenditures, and acted essentially upon an informal determination he had made in late 1951 or early 1952 and ignored relevant facts brought to his attention between that time and September 1955 showing that at least parts of his initial determination were erroneous. In determining item (b) above Mammel was wholly imaginary and did not even purport to find whether the so-called extra production remained in inventory or was sold and admits that he had no evidence that so much as one pound of this asserted extra 4,000,000 pounds of candy was ever sold or shipped or remained in possession. In determining substantial disallowances comprising item (c) above Mammel failed to follow reasonable procedures to test the verity of plaintiff's claimed deductions but made disallowances by whim and caprice on the excuse that he 'didn't have time' between 1949 and 1955 to investigate. The arbitrary, capricious and unlawful actions in this finding described were carried into and are substantially found in the determination of November 14, 1955.

"5-11. [Revenue Agent] Mammel's determinations were arbitrary, capricious and unlawful in the extreme. Such action sprang from Mammel's lack of the requisite mental capacity to make a fair, reasonable and lawful assessment. Mammel suffered a complete mental break-down on March 19, 1953. The record shows that in 1955 he had not recovered sufficiently therefrom to competently exercise his office. Upon examination herein in February 1956 Mammel was unable to recall or to understand basic rules of taxation which he should have taken into consideration when he made the assessment of September 1955. He also was unable to recall important points developed during the criminal trial of late 1953 to which he should have applied fair and mentally competent judgment in making the 1955 assessment. Mammel did not possess or exercise requisite mental competence in making the instant assessment.

"5-12. The making of the assessment and jeopardy

levy has had the effect of completely tying up, with *de minimis* exceptions, all of the taxpayer's assets. Unless the arbitrary assessment and levy is set aside the taxpayer will be without funds to pay the fees and taxes necessary to maintain its corporate existence. If collection upon the jeopardy levy was permitted, all of the taxpayer's assets would be seized and it would be without funds to engage lawyers, accountants or pay any other expenses necessarily incident to a legal proceeding to recover the unlawful exaction resulting from Mammel's arbitrary and capricious assessment."

The District Court concluded that not merely the steps to collect the assessment were illegal but the assessment itself, *i.e.*, the tax as it was asserted to apply to petitioner, was wholly void and of no legal effect[4] and that plaintiff was entitled to a permanent injunction against the enforcement of the assessment and levy (App. B. 113). The District Court held

"The assessment * * * and the deficiency notice * * * were made unlawfully and in violation of plaintiff's constitutional rights, and were, and are, beyond the jurisdiction of the Commissioner of Internal Revenue, and are wholly null and void."

THE SECOND APPEAL.

Upon the second appeal, leading to the decision sought to be reviewed, the Government did not contest the factual correctness of the District Court's foregoing findings of fact. They stand as the facts of the case.

Upon oral argument in the Court of Appeals Assistant Attorney General Richard Roberts confessed that the point of privilege was not well taken, saying frankly, as we recall

4. Observe that the first Court of Appeals opinion herein characterized this case as "a frontal attack on the assessment". (Appendix C, p. 21, *infra*).

his words,[5] "If we have to rely upon privilege, we are sunk," or, "* * * we are done."

The Government's position in the Court of Appeals was that granting everything in the complaint and in the evidence to be true, Section 7421(a) of 26 U. S. C. A. forbidding injunctions restraining the assessment or collection of any tax, precluded equitable relief—that unless a potential taxpayer made a completely clear affirmative showing that he owed no tax at all he could obtain no injunctive relief no matter how illegal the assessment against him was or how ineffective or unavailable his other theoretical remedies.

The Court of Appeals reversed on the theory set forth in the opening paragraphs of our Reasons for Allowance of the Writ.

REASONS FOR ALLOWANCE OF THE WRIT.

Until the Court of Appeals decision herein it was unbroken law that when a purported Federal tax was illegally *assessed* or *levied* against a potential taxpayer, and there were extraordinary circumstances making other forms of relief illusory or non-effective, Federal courts, to protect citizens against seizure of their property except by due process of law, would grant injunctive relief. Admittedly, situations that permitted this relief were few and it was granted sparingly.

The first opinion of the Court of Appeals herein (Appendix C, p. 29, *infra*) recognized this law, saying that (a) "When compelling factual reasons were established in various earlier cases, federal courts have bypassed Section 7421, taken jurisdiction and exercised their equity power" and, (b) that Treasury authority to make jeopardy assess-

5. Oral arguments in the Seventh Court of Appeals are not regularly recorded, and, so far as we know, neither party had a special reporter present for the oral argument of this case.

ments of asserted income taxes was, "like all first aid measures * * * subject to abuse or improper use. * * * We are not now saying that either the bond section or tax court review are the panacea for all ills suffered when a jeopardy assessment is utilized * * *" (Appendix C, p. 26, *infra*). However, that panel of the Court, wanted a more complete development of the facts pertaining to the assessment.

The instant decision, which accepts the District Court's findings that the jeopardy assessment herein was made with wanton, and necessarily deliberate, disregard of important relevant facts (or absence of facts), and of important relevant law, *i. e.*, findings that authority to make an assessment was abused, or improperly used, so that it was not intended to be a real assessment but a deliberate overvaluation, has nevertheless termed the assessment a mere "step taken to collect" (Appendix A, p. 4, *infra*), and as such a "step" held it to be immune from injunctive relief, regardless of how illegal or abusive the so-called "step" (assessment) is.

The supposed distinction between what the Court of Appeals calls "illegality of the tax itself" and illegality in "steps to collect," is wholly new and ignores the disjunctive distinction between "assessment" and "collection" in the very statute, (p. 7 *ante*) on which the opinion relies. It is fallacious because a tax has no existence save in the cold print of the statute book until "steps" are taken to determine its supposed amount (assess it) as against a potential taxpayer and to collect it. Other Circuits have enjoined "steps to collect", as for example, a sale of goods to secure dollar collection under an admittedly valid jeopardy assessment (Eighth Circuit), or an assertion of so-called transferee liability (Fourth Circuit).

The effect of the instant opinion is that there never can be an injunction to restrain collection of an asserted income tax from a *potential* income taxpayer no matter how far

the boundaries of due process are exceeded in the purported assessment because, conceivably, a potential taxpayer *could* owe some income tax in some amount. Or, stated another way, unless a plaintiff is a charity or otherwise wholly exempted from the ambit of income taxes, he cannot obtain relief even though he actually owes no tax whatsoever and a jeopardy assessment and seizure of all his assets has been made corruptly not to obtain revenue but to accomplish other objectives. The opinion limits "illegality" which will warrant equitable intervention solely to situations where no tax of the variety imposed could possibly be laid against the complainant.

Baldly, the decision sought to be reviewed assumes that the assessment was deliberately placed at an extortionately high figure that cannot possibly be justified and is far beyond taxpayer's ability to pay; that the assessment is no mere rational mistake nor erroneous, but good faith, estimate of liability; that it is a deliberate over-assessment to make sure that petitioner would be deprived of all its property and means of defense; that enforcement of it will be an effective death sentence on the corporation. Nevertheless it holds that the courts, bound to enforce a Constitution which guarantees that citizens' property be taken only by due process of law, cannot effectively intervene. We submit the simple statement of the proposition demonstrates the necessity for review.

If by any chance it should be the law that the present decision is correct and that supposedly free citizens are the helpless victims of the prejudices or idiosyncrasies of administrative servants, we submit that this Court still should review the case and say so clearly so that Congress can enact such remedial legislation as may be necessary to effectively hold taxing officers within bounds of the Constitution.

If, as we contend, the instant decision is erroneous,

certiorari should be granted so that it may be reversed, petitioner be accorded its constitutional right to its property unless it be taken by due process of law, and the conflict with the law of other Circuits be eliminated.

Specifically, certiorari should be granted because:

1.

The opinion of the Court of Appeals for the 7th Circuit in attempting to create a distinction between what it terms "illegality in collection of a tax" and "illegality of the tax itself," is in conflict with decisions of the Courts of Appeals for the 2nd, 4th, 5th, 6th, 8th and 9th Circuits and is in conflict with the earlier decision herein by a different panel of the Court of Appeals for the 7th Circuit.

2.

The Court of Appeals for the 7th Circuit has decided an important question of Federal tax and equity law contrary to this Court's decision in *Miller* v. *Standard Nut Margarine Co.* (284 U. S. 498), by interpreting that decision to mean that no person who possibly can be subject to income taxes can ever secure equitable intervention against a purported assessment of such taxes no matter how illegally and capriciously the assessment is made, and no matter how ineffective any other supposed remedies may be.

3.

The Court of Appeals for the 7th Circuit has decided an important question of Federal law contrary to this Court's decision in *Helvering* v. *Taylor* (293 U. S. 507), by holding that where the Commissioner of Internal Revenue's determination of an asserted tax liability is shown to be without rational foundation and excessive, it still will

be accepted as "legal" unless the asserted taxpayer proves he owes nothing whatsoever.

4.

By treating petitioner's complaint and proof, and the District Court's undisturbed findings of fact, that Internal Revenue's determination that there was a tax was arbitrary, capricious and unlawful in the extreme, as a mere challenge to "steps taken by the Government to collect" a presumably valid tax and not as an assertion that a tax so arrived at is illegal, the Court of Appeals for the 7th Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT.

The supposed distinction drawn by the Court of Appeals for the 7th Circuit between "illegality of the tax itself" and "illegality in steps of collection" is without merit and is in conflict with the decisions of the Courts of Appeals for the 2nd, 4th, 8th and 9th Circuits and with their interpretation of this Court's decisions in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, and *Hill* v. *Wallace*, 259 U. S. 44. (*National Foundry Co. of N. Y., Inc.* v. *Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956); *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953); *Yoke* v. *Mazzella*, 202 F. 2d 508 (C. A. 4, 1953); *Smith* v. *Flinn*, 261 F. 2d 781 (C. A. 8, 1958), and *Yoshimura* v. *Alsup*, 167 F. 2d 104 (C. A. 9, 1948)).

In each of the cited Courts of Appeals cases the courts (a) relied upon and applied the teachings of this Court in *Miller* v. *Standard Nut Margarine Co.* and *Hill* v. *Wallace*, and (b) enjoined revenue officials from illegal conduct in what manifestly were "collection steps." Specifically, *Smith* v. *Flinn*, 261 F. 2d 781 (C. A. 8, 1958), restrained defendant Director from selling, contrary to statutory requirements of 26 U. S. C. § 6863, property seized "for the collection of tax" under a jeopardy assessment; *National Foundry Co. of N. Y., Inc.* v. *Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956), restrained the defendant Director from collection of penalties and interest accruing after the filing of a bankruptcy petition, the tax assessment itself having been allowed in the bankruptcy decree; *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953), restrained levy against plaintiff as transferee of a third person liable for the tax; *Yoshimura* v.

Alsup, 167 F. 2d 104 (C. A. 9, 1948), restrained collection of an assessment made by virtue of an executed Form 870 (consent to assessment) which the Court found to have been obtained by fraudulent and coercive conduct of revenue agents; *Yoke* v. *Mazzello*, 202 F. 2d 508 (C. A. 4, 1953), restrained levy under jeopardy assessment where the defendant Director had refused to accept a bond the signatories of which were satisfactory to him.

In the latter case the Court succinctly summarized the law as follows (emphasis supplied):

> "This [injunctive] course has been followed in situations of dire necessity where it was believed that *the assessment was clearly unlawful*, or was levied against the wrong person, and the enforcement of the tax would inflict an irreparable loss upon the complainant * * *."

In *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 at page 509, this Court referred to the rule permitting limited equitable intervention as a "salutary" rule and said:

> "Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. 475), which became R. S., § 3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. * * * this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. (Citing cases.) Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. (Citing cases.) The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would

require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. * * *"

The test of "illegality" announced in the decision sought to be reviewed, was not the law of the 7th Circuit under the first decision herein, which clearly was predicated on the belief that a case of "illegality" *could* be made by one who was within the general ambit of the income tax laws. Obviously Judges Finnegan, Lindley and Swaim felt that it would be possible to show a cause of action (as did the District Court) on the basis of the law in other circuits. Judges Schnackenberg and Hastings arrive at a contrary result, supposedly on the strength of intervening authority in the 7th Circuit and although Judge Duffy concurs his concurrence seems to us to be mostly dissent.

The opinion sought to be reviewed limits "illegality" which will warrant equitable intervention solely to situations where no tax whatsoever of the variety assessed could possibly be laid against the complainant. This straitened interpretation of "illegality" is in conflict with the decisions of the Courts of Appeals for the 2nd, 4th, 6th, 8th and 9th Circuits and with their interpretation of this Court's decisions in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, and *Hill* v. *Wallace*, 259 U. S. 44. (*National Foundry Co. of N. Y., Inc.* v. *Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956); *Yoke* v. *Mazzello*, 202 F. 2d 508 (C. A. 4, 1953); *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953); *Midwest Haulers, Inc.* v. *Brady*, 128 F. 2d 496 (C. A. 6, 1942); *Smith* v. *Flinn*, 261 F. 2d 781 (C. A. 8, 1958); *Yoshimura* v. *Alsup*, 167 F. 2d 104 (C. A. 9, 1948).)

In each of the foregoing cases the various Courts of Appeals granted injunctive relief notwithstanding that the taxpayer *conceded that he was subject to the particular va-*

riety of tax sought to be imposed. Specifically, in *Midwest Haulers, Inc. v. Brady*, 128 F. 2d 496 (C. A. 6, 1942), the taxpayer was subject to social security taxes and had filed returns and paid such taxes with respect to individuals in its employ—the sole question was as to whether certain additional persons were its "employees"; in *Yale v. Mazzello*, 202 F. 2d 508 (C. A. 4, 1953), the taxpayer was subject to income taxes on income from a restaurant for at least some of the years covered by the jeopardy assessment and had filed tax returns and paid the tax shown thereon for some of the years involved; in *Shelton v. Gill*, 202 F. 2d 503 (C. A. 4, 1953), complainant conceded his liability as a transferee of his father but obtained injunctive relief against liability as a transferee of one Duckworth; in *Yoshimura v. Alsup*, 167 F. 2d 104 (C. A. 9, 1948), taxpayer had returned and paid income taxes and was further liable for at least the additional tax attributable to a mis-entry of $150.00 on his books; in *National Foundry Co. of N. Y., Inc. v. Director of Internal Revenue*, 229 F. 2d 149 (C. A. 2, 1956), the liability of taxpayer for additional taxes was recognized and had been provided for in the bankruptcy order—injunctive relief was granted solely as to tax penalties and interest accruing after the date of the filing of the bankruptcy petition; in *Smith v. Flinn*, 261 F. 2d 781 (C. A. 8, 1958), the determination of additional tax was pending before the Tax Court and the opinion makes clear that the injunctive relief relates solely to the sale of property seized under jeopardy assessment while the Tax Court proceeding was pending.

Basically the decision sought to be reviewed is an erroneous interpretation of *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498. *Nut Margarine* does not stand for the narrow proposition that equity will intervene only where there is no possibility any tax of the variety involved can lawfully be imposed upon the complainant. It

is true that that was the factual situation there. But in *Nat Margarine* this Court stated that the statutory provision prohibiting injunctions against assessment or collection of taxes (now 26 U. S. C. §7421) was merely codification of the existing common-law rule that suit will not lie to restrain collection "upon the sole ground of its illegality" unless there were in addition special and extraordinary circumstances.

In *Nat Margarine* the Court, among other cases, relied upon its prior decision in *State Railroad Tax Cases*, 92 U. S. 575, in which an involved attack was made upon the application of an Illinois franchise tax against railroads involving a valuation of railroad capital stock (which attack was held to be without merit), this Court reviewed the common law and state decisions on injunctive relief against taxes thoroughly and said (p. 613, emphasis supplied):

> "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity of themselves, give the right to an injunction in a court of equity. *Moores v. Smedley*, 6 Johns. Ch. 27; *Dodd v. Hartford*, 26 Conn. 239; *Green v. Munford*, 5 R. I. 478; *Messert v. Supervisors of Columbia*, 50 Barb. 190; *Dow v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 548.
>
> "The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.
>
> "That there might be no misunderstanding of the

universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See *Cheatham* v. *Norvell*, decided at this term; *Nickoll* v. *United States*, 7 Wall. 122; *Dows* v. *Chicago*, 11 Wall. 108.

"In this latter case, this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says, 'No court of equity will, therefore, allow its injunction to issue to restrain their action, *except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law.* It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' So, in the case of *Hannewinkle* v. *Georgetown*, the court says, 'It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction.' 15 Wall. 548. If

do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax."

The effect of the Court of Appeals decision at bar is, contrary to the foregoing law, to lay down an absolute limitation, and a very stringent and unprecedented one, on the powers of a court of equity. Unless a complainant can show that the tax statute involved is unconstitutional or that he is a person wholly exempt from the tax (as, for example, an eleemosynary institution), he cannot possibly obtain injunctive relief no matter how corruptly or illegally an assessment is made against him or how illusory any other supposed remedies may be. That is not the law as this Court announced it in 1875 in the *State Railroad Tax Cases*, or in 1932 in the *Nut Margarine* case.

Specifically, the doctrine at bar would mean that with respect to the one tax most citizens are most concerned with—the income tax, and which concededly can be abused by officials who may be vindictive or irrational—the great bulk of citizens are absolutely debarred from equitable relief and relegated solely to remedies that may, as here, be wholly illusory.

This Court has never announced a doctrine such as is announced in the decision at bar. Nor has this Court ever said that it is incumbent upon a protesting taxpayer who shows that a tax levied against him is flagrantly wrong

and cannot possibly be sustained, to show also that he owed no tax whatsoever, or, if he owes any, what the correct amount of it is. In *Helvering* v. *Taylor*, 293 U. S. 507, this Court said at page 514:

> "We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the commissioner's determination, shown to be without rational foundation and excessive, will be enforced unless the taxpayer proves he owes nothing or if liable at all, shows the correct amount."

A purported tax assessment, of whatever variety, that is purposely and deliberately or irrationally made too high, in fact is no assessment at all, for "assessment" by definition (see *Webster's* New International Dictionary, Second Edition) must be a "valuation". While Congress, by empowering revenue officials to make jeopardy assessments of income taxes, undoubtedly empowered them to make valuations which were not precise but were estimates on the best evidence available, it never authorized any taxing officer to deliberately or irrationally over-value or over-assess.

The present opinion, if allowed to stand, will operate as a warrant to taxing officers that they need make no effort to be fair to taxpayers; that they need not even attempt to exercise discretion on subjects on which they must exercise fair and reasonable discretion; that having so acted they can seize all of a citizen's property. That is what the proof undeniably shows.[6] The constitutional

6. We are not called upon to defend or show the soundness of the District Court's factual findings as to the utter capriciousness and irrationality of the monstrous assessment here levied. Those findings stand as the facts of the case. It is significant that the Government did not attempt to attack them in the Court of Appeals but conceded that they were sound, arguing at pages 12 and 13 of its brief in that Court as follows:

> "There must be a showing that the tax was illegally assessed, coupled with a showing of 'special and extraordinary

guaranty of due process would become a mockery if such was to become the law.

There obviously must be some point beyond which the Courts will not let tax collectors go in seizing property under the guise of an "assessment." Whatever the Treasury's powers may be with respect to jeopardy assessments, they necessarily are limited to making "assessments." Congress never has authorized the Treasury to deliberately "mis-assess" and could not constitutionally do so if it would. A jeopardy assessment may, perhaps, be imprecise, *but it cannot be a deliberate over-valuation or it loses its necessary quality of "assessment."* A jeopardy assessment, like any other tax assessment, is not the mere mechanical matter of filling out the requisite forms—an "assessment," by definition must be *honest valuation.*

The various state courts, enforcing a public policy against equitable interference with collection of revenue that is as strong as the Federal policy, have long recog-

> circumstances' sufficient to bring the case within a recognized head of equity jurisdiction. * * * *In itself a showing of illegality is not enough.* * * *
>
> "Viewed in this light, *the issue in the case at bar is not the truth or falsity of taxpayer's assertion that the tax was illegally assessed.* Instead, *the real crux* of the case is whether the taxpayer has given any indication that there are special and extraordinary circumstances * * *."

Moreover, and shocking through the revelations of the Mammiel deposition as to how this assessment was put together were, the Government's improper refusal to obey the District Court's order for production of relevant documents raises a strong presumption that the actual documents would have served to show even further illegality. The Department of Justice was forced to confess in the Court of Appeals that its claim of privilege could not be sustained (p. 13, *ante*). We think it axiomatic that the Government should always be willing, indeed, anxious, to tell a citizen precisely how, and upon what basis, it arrives at a determination that he owes more taxes. We suggest it is manifest that an assemblage of taxing officers and lawyers would not decide to stand upon an illegal claim of privilege as they did here (App. B, 89 *et seq.*) unless they feared the revelations that would come from producing the relevant records.

nized that there may be injunctions, where a purported real estate assessment is a deliberate over-valuation or over-assessment. In such rare situations the real estate, of course, is subject to some tax (and therefore under the reasoning of the Court of Appeals at bar no injunction ever could be issued), nevertheless the state courts issue injunctions. We quote from typical cases:

In *Lambrecht* v. *Wilson*, 290 Ill. 547, 549-50, the Court said:

> "An over-valuation or an under-valuation of property will not, of itself and alone, invalidate an assessment (*Barkley* v. *Dale*, 213 Ill. 614), but where the valuation is so grossly out of proportion to the true value as to show that the assessor could not have been honest in his valuation the assessment may be impeached for fraud, and by reason of fraud in making the assessment *the assessment amounts to no assessment at all.*" (Emphasis added.)

In *Sunday Lake Iron Co.* v. *Wakefield*, 186 Mich. 626, 153 N. W. 14, 16, the Court recognized the long-standing rule that a tax assessment made with prejudice or a disregard of duty is invalid and should be enjoined:

> "An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive; *but if it is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons* • • • *the case is a plain one for the equitable remedy by injunction. In such case the tax is necessarily invalid.*" (Emphasis added.)

The interpretation of 26 U. S. C. § 7421 by the decision sought to be reviewed, which would make that statute an *absolute* bar to equitable intervention unless the complainant is wholly outside the ambit of the taxing statute involved, would render the statute unconstitutional as one permitting administrative seizure of property without due

process of law. None of the so-called "remedial" or review provisions of the revenue laws would, in the context of this case, afford Homan its constitutional right of due process:

Appeal to the Tax Court would not prevent the immediate seizure of all of Homan's assets. Homan needed the immediate protection afforded only by a court of equity. Actually, there could be no appeal to the Tax Court until the Commissioner issued a deficiency notice (*Mason* v. *Commissioner*, 210 F. 2d 388, C. A. 5, 1954), and this deficiency notice need not be (and was not) issued by the Commissioner until sixty (60) days after the jeopardy assessment (26 U. S. C. § 6861(b)). In the interval nothing—other than the injunctive relief—would prevent the District Director from seizing all of Homan's assets (26 U. S. C. § 6331(a)). Even after Tax Court jurisdiction is invoked the Commissioner could levy on all of taxpayer's assets thereby rendering it totally unable to proceed in the Tax Court (Appendix B, p. 13, *infra*).

Under the rule of *Flora* v. *U. S.*, 357 U. S. 63 (1958), no suit for refund can be brought unless the total amount of the assessment, including penalties and interest has been paid. It is manifestly impossible for Homan to pay an assessment three times its total assets and then bring a suit for refund.

The statutory provisions (26 U. S. C. § 6861(c) and (g)) for administrative relief by abatement in the absence of "jeopardy" or partial abatement of excessive assessment are of no assistance to Homan, in view of the position taken by the District Director in his answer and the established facts as to the purpose of deliberate misassessment to create the appearance of jeopardy in the instant case.

Nor can it be said that the provisions for posting of a bond in twice the amount of the tax (26 U. S. C. § 6863;

26 U. S. C. (1939 I. R. C.) § 872(f)) affords Homan any relief when its assets are but one-third of the assessment.

On the first appeal in this case, the Court of Appeals noted:

> "Congress gave the Secretary, or his delegate, a stop-gap remedy under § 6861. Like all first aid measures it is subject to abuse or improper use. The Code does provide interim relief for a taxpayer if he is able to give a bond under § 6863 and, of course, a review of the assessment is available in the tax court. We are not now saying that either the bond section or tax court review are the panacea for all ills suffered when a jeopardy assessment is utilized by the government."

Courts of Appeals in other Circuits have also recognized, in particular cases, the inadequacies of Tax Court review, suits for refund, administrative relief, or posting of bond to stay collection and have therefore granted injunctive relief. *Shelton* v. *Gill*, 202 F. 2d 503 (C. A. 4, 1953); *Midwest Haulers, Inc.* v. *Brady*, 128 F. 2d 496 (C. A. 6, 1942); *John M. Hirst & Co.* v. *Gentsch*, 133 F. 2d 247 (C. A. 6, 1943).

The rule announced by the opinion sought to be reviewed applies to all types of taxation, income, estate, gift, excise, employment, alcohol, tobacco, gasoline or occupational. Except with respect to income, estate and gift taxes, the taxpayer's only ordinary remedy is to pay the assessment and sue for a refund under the rule of *Flora* v. *U. S.*, 357 U. S. 28 (1958); the Tax Court has no jurisdiction as to such other taxes, nor is administrative abatement or bond posting provided as to them.

It is, therefore, apparent that taxing authorities could arbitrarily *mis-assess* these other kinds of taxes at figures in excess of a taxpayer's assets, and thereby preclude the taxpayer from a judicial determination of his *true* tax liability unless the injunctive remedy was preserved as

utilized in those rare cases where it is necessary. If 26 U. S. C. § 7421(a) is construed to preclude injunctive relief in such instances as we have posed, and as it does under the decision sought to be reviewed, it would follow that either it, or these other taxing statues are unconstitutional.

CONCLUSION.

The revenues of the United States can be collected without difficulty within the confines of the Constitution. It is not necessary for the courts to extend *carte blanche* to revenue officials to do whatever they wish.

It is respectfully submitted that the writ of certiorari should issue.

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